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OFFICE OF THE PUBLIC DEFENDER
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STATE OF DELAWARE

COMPENDIUM OF RECENT CRIMINAL-LAW DECISIONS FROM THE DELAWARE SUPREME COURT

Cases Summarized and Compiled by
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DELAWARE SUPERIOR COURT CASES

HOOVER v. STATE, 958 A.2d 816 (October 6, 2008): OPERATION OF A MOTOR VEHICLE CAUSING DEATH/ UNCONSTITUTIONAL VAGUENESS

Two questions regarding 11 *Del.C.* § 4176A, Operation of a Motor Vehicle Causing Death (OMVCD), were certified to the Court due to conflict in application of the statute. The Court concluded that 11 *Del. C.* § 251, which requires a state-of-mind element to constitute a crime unless a legislative purpose to impose strict liability "plainly appears," did not apply to OMVCD. The plain language and legislative history of OMVCD reflects intent to impose strict liability. The existence of crimes involving death that do require a state of mind, such as vehicular homicide, manslaughter and criminally negligent homicide, supports the conclusion that the legislature intended to create the unclassified misdemeanor of OMVCD as an offense that involves a less culpable state of mind than criminal negligence. Thus, strict liability is plainly apparent.

The Court also concluded that the statute was not unconstitutionally vague. An absence of the requirement of a state of mind does not render the statute vague. Additionally, OMVCD is codified within the motor vehicle provisions so it relates to public safety and welfare. Thus, a specific state of mind is not required. The statute gives sufficient notice to a person of common intelligence that violating the motor vehicle code is an offense.

The Court did raise a question for future litigation. It questioned whether a 30 month sentence for a person who did not have intent to commit a crime was "relatively small" and did not violate due process. The Court did not undertake to answer this question as it was not certified.

BROWN & DILLARD v. STATE, 958 A.2d 833 (October 6, 2008): ALIBI INSTRUCTION **REVERSED & REMANDED**

Co-D's each offered evidence of and argued an alibi defense to murder and related charges. Each D presented witnesses who testified that they were with D and that D could not have been at the seen of the murder. Further, one D testified on his own behalf. Co-D's asked the trial court to deliver an alibi instruction, but the court refused.

On appeal, Co-D's argued the refusal to give the instruction was reversible error. In reversing, the Court explained that D is entitled to an alibi instruction when "some credible evidence" of an alibi is given and D requests it. Without the instruction, the jury may erroneously think alibi is an affirmative defense which places the burden on D.

CLAUDIO & MAYMI v. STATE, 958 A.2d 846 (October 8, 2008): FELONY MURDER / "IN FURTHERANCE OF"

In 1991, the Court affirmed the Co-D's convictions of felony murder and related offenses. In 2002, the Court , in *Williams v. State*, overruled previous law regarding felony murder and explained that a killing must "facilitate commission" or "move the felony forward." In 2007, in *Chao v. State*, the Court held that *Williams* applied retroactively.

On appeal from the denial of post-conviction relief, Co-D's argued that, while the jury instruction was generally consistent with the language in the later *Williams* case, the jury could have been confused about what "in furtherance of" meant. The definition of "in furtherance of" in the instruction differed slightly from that in *Williams*. In affirming, the Court explained the given instruction was a correct statement of the law and that D's are not entitled to specific words of the instruction. Additionally, the facts in this case supported the conclusion that the killing furthered the robbery.

HIGNUTT v. STATE, 58 A.2d 863 (October 15, 2008): RELEVANCE OF A WITNESS' PERSONAL INFORMATION/ LIO INSTRUCTION

D was a service manager at a car dealership. He had a technician work on his daughter's car then list the amount owed for parts and labor on the invoice of another customer. D was fired and later convicted of felony theft and falsifying business records.

At trial, the technician was asked about "personal goals." He responded that he was responsible for supporting his younger brothers and his fiancée. The trial court refused D's request for a curative instruction to disregard this testimony. It did give a standard "sympathy" instruction at the end of trial. Further, the prosecutor argued that D suggested, during cross examination, that the tech had been on probation. thus, he asked the question to rehabilitate him. The Court found that the testimony did not prejudice D and that it was relevant background information.

D also argued on appeal that the trial court erred when it failed to issue a LIO instruction on misdemeanor theft because the value of the goods and services were in dispute. However, there was a portion of the value that was not in dispute. And, even if the disputed amount was eliminated, the value would still be over $1,000.

STAATS v. STATE, 2008 WL 4605933 (October 17, 2008): POST-CONVICTION RELIEF

D's convictions of Murder First and PFDCF were affirmed on direct appeal. D later filed a Rule 61 motion arguing that his trial counsel had been ineffective because he: did not sufficiently investigate the case; did not get a DNA expert; and improperly allowed a flight instruction. The lower court found D's motion was time-barred but went ahead and reviewed it for a miscarriage of justice. It then denied the motion.

On appeal, the Court found that the lower court erred in concluding that the motion was time barred. However, the lower court did address the issue and did so under the proper *Strickland* analysis. The Court affirmed the denial of the motion. A DNA expert would have added nothing to the case as several eyewitnesses placed D at the scene of the crimes. Also, counsel did conduct a proper investigation and met with D to discuss trial strategy. Finally, Appellate Counsel raised the flight instruction issue on direct appeal and the Court found the instruction proper. Thus, there was no ineffective assistance of counsel on that issue.

FOSTER v. STATE, 2008 WL 4684342 (October 24, 2008): *CSI* REFERENCE/EXCITED UTTERANCE/ § 3507

D broke into mentally-disabled V's house, stole $20 from him and disconnected his phone. V went across the street and called his sister. He was pale and kept repeating himself. D was convicted of burglary second and robbery second.

The prosecutor referenced the *CSI* television show in his opening statement and told the jury that not all of the tests on T.V. exist and not all the tests are done in each case. Unfortunately, D did not object. The comments were improper but did not rise to plain error. [Editor's note: This is the fourth time the Court has addressed this issue and expressed disfavor for these "T.V." comments. However, in almost every case D failed to object and the Court applied only a plain error standard. Prosecutor's continue to make these comments regularly. Thus, D's should be objecting regularly.]

Statements by V to his sister were properly admitted as excited utterances. D argued that the statements did not meet that hearsay exception's "timing" requirement as they were not made immediately. The Court concluded that timing is not dispositive.

Finally, argument that V's statements did not satisfy § 3507 was waived below.

MORGAN v. STATE, 2008 WL 4943154 (November 20, 2008): SEARCH WARRANT/CURATIVE INSTRUCTIONS

CI described D's car for police and claimed D was going to sell ecstasy at a certain location. Police followed the car and tried to pull it over. The occupants of the car were moving around and the driver, D's girlfriend, took her time to pull over. Police testified that this is consistent with drug dealing. The driver was nervous and when she opened the glove box for her paperwork, a digital scale fell out. A small amount of crack was found on the front passenger seat.

Based on the evidence recovered from D's car and the CI's information, police obtained a search warrant for D's home. The same CI had previously improperly reported D was going to participate in a drug sale, but the sale never occurred. This was omitted in the application for the warrant.

The search of D's home produced drugs and money. At trial, the State attempted to introduce forfeiture forms D signed after he invoked his right to silence. D's objection to these forms that indicated his claim of ownership on the money was sustained. D did not request a curative instruction.

The Court also found the search of the house was valid. There was a nexus between that which was sought and the house. The girlfriend gave the address to the house. The sought after ecstasy pills were not in the car. The officer's training and experience is that drugs are kept in the house. Also, failure to mention the previously erroneous tip was irrelevant as the warrant was not based on that information.

Finally, the trial court was not required to *sua sponte* give a curative regarding the forfeiture forms. And, there was other sufficient evidence of D's guilt so that the lack of a curative did not constitute plain error.

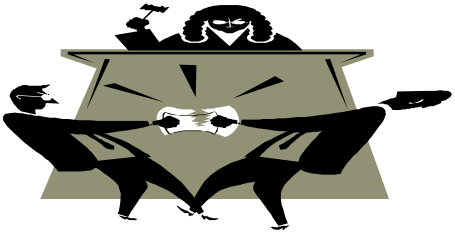
WILLIAMS v. STATE, 2008 WL 5064756 (December 2, 2008): COMMUNITY CARETAKING DOCTRINE /SEIZURE

Around 4:00 am on a cold and windy October day, an officer saw D walking on the median of Rt. 113. He asked D if he needed a ride. D declined then, upon request, gave the officer his name and birth date. The encounter ceased, but when the officer looked up D's information, he found that D was wanted on some warrants. The officer returned to D and arrested him. A search incident to arrest produced a handgun in D's waistband. D was convicted of CCDW.

The Court ruled that the initial encounter between the officer and D was not a "seizure." The officer pulled up his car behind D and did not have his emergency flashers on. The exchange was pleasant. Thus, there was nothing to lead D to believe he was not free to leave. Assuming *arguendo* that D was seized, it was permissible under the "community caretaker" or "public safety" doctrine. The Court adopted this rule for the first time. As long as an officer has a reasonable and articulable basis to believe that D is in need of assistance, the stop is valid. Unless other facts are developed, the encounter must end the minute the officer sees that D is no longer in peril.

The Court also rejected the argument that the officer unlawfully asked D for his name and birth date because D had already refused assistance. This limited request for information was reasonable because the officer must make a written report of contact with individuals.

HARDY v. STATE, 2008 WL 5148728 (December 9, 2008): PROSECUTORIAL MISCONDUCTREVERSED & REMANDED****



D and V were drug users and had dated in the past. They got into a huge fight wherein D hit V with a metal pole which left bruises on her body. He also forced her to engage in vaginal intercourse. D was charged with rape and related charges.

At trial, D did not testify. However, evidence was introduced that when D was arrested, he was asked whether he had *raped* V. He denied this. During closing, the prosecutor told the jury that D denied *having sex* with V. Thus, according to the prosecutor, the DNA proved he was lying. The prosecutor also stated that while there are falsely reported rapes, they do not go to trial because those claims fall apart "real quick." D did not object to these comments and was found guilty on all charges.

On appeal, D argued the prosecutor engaged in misconduct by misstating evidence, vouching for the State's case, and by telling the jury to speculate about D's criminal history even though D did not testify. In reversing, the Court explained that the presumption of innocence is a fundamental right and the prosecutor's implication that the State only prosecutes the guilty deprived D of that presumption. Even though D did not object at trial, the improper vouching constituted plain error and required reversal.

JIANNINEY v. STATE, 2008 WL 5162500 (December 10, 2008): ADMISSIBILITY OF *MAPQUEST* INFORMATION

D drove a fuel delivery truck for a living. However, he was alleged to have made contact with a child V at the V's house one day around at 11:30 a.m. Later that day, at 6:00 p.m., D allegedly made contact with V again and offered him money so that V would show him his penis. An eyewitness placed D in the area around the time of the second meeting.

D's boss testified that, based on his knowledge of the area, D could not have been at that location at that time as he was completing certain deliveries. On cross, D's boss said he was familiar with *Mapquest* and that he had used it one time a while back. Under the market reports and commercial publications exception to the hearsay rule, the State introduced various *Mapquest* printouts in order to show, not only directions and distances but, driving times.

On appeal from his conviction of sexual solicitation of a child, The Court agreed with D that there was no sufficient foundation that the driving times in *Mapquest* are commonly relied upon and used by the public or people in specific occupations. However, the error was harmless due to, among other things, the independent eyewitness and the inaccuracies of the *Mapquest* information.

GREENE v. STATE, 2008 WL 5179903 (December 11, 2008): *MIRANDA*/ STANDARD ON 26(C)/ HARMLESS ERROR

D's attorney filed a 26(c) motion and brief. D then argued, among other things, that police did not Mirandize him prior to his providing inculpatory statements. The State conceded that the statements were unlawfully obtained and should not have been admitted at trial. However, the State argued, it was harmless error. The Court concluded that D presented an arguable issue that precluded summary disposition of the case. The attorney's motion to withdraw was granted and substitute counsel was appointed.

SMITH v. STATE, 2008 WL 5246057 (December 18, 2008): D.R.E. 401/ D.R.E. 410/ *PENA* MISTRIAL FACTORS

On his way home from work, V was grabbed from behind by two men. He was then shot in the abdomen. Police developed Co-D as a suspect. Co-D said that D was the one who shot V. Co-D pled in exchange for testifying that D said that the State was "trying to get me habitual." D moved for a mistrial arguing that the "habitual" comment

violated *D.R.E.* 404(a) because the jury would understand "habitual" was short for "habitual offender" and conclude that D was a career criminal.

After questioning resumed, Co-D stated that he asked D what the State offered him and D replied, "ten." D immediately objected arguing that this comment violated *D.R.E.* 410 because it was testimony about plea negotiations. The trial court issued a curative instruction and D made no further applications. D was later convicted of attempted robbery first, assault second, and conspiracy second.

On appeal, D raised his initial arguments. This time, however, he argued that a mistrial should have been declared as a result of Co-D's "ten" comment. In affirming the Court applied the *Pena* test and concluded that: the comments were "fleeting" and "unsolicited;" there was only a small chance prejudice would result from the comments; and sufficient curatives were given. Only one factor weighed in favor of a mistrial: this was a close credibility case.

MASON v. STATE, 2008 WL 5303629 (December 22, 2008): REDACTION OF INTERROGATION TAPES/ MURDER LIO'S

D was involved in a drug deal gone bad. After he saw the seller, V, reach for a gun, D acted first and shot V twice in the abdomen. D was later interrogated but was evasive. He kept insisting that he was there for a violation of probation. D asked that the tape of the interrogation be excluded but, upon State's objection, the trial court allowed it. Additionally, while the trial court granted D's request to instruct the jury on the LIO's of murder second and manslaughter, it refused to instruct on criminally negligent homicide.

On appeal, the Court concluded that it was error to allow the unredacted tapes into evidence. Reference to probation is a reference to having been convicted of a crime. Thus, it is not probative. The tape of the interrogation could have been redacted and still been useful. However, the error was harmless due to the strength of the State's case. The Court also concluded there was no rational basis for giving an a LIO of criminally negligent homicide because there is no doubt D intended to shoot V and D knew shooting V could kill him.

TAYLOR v. STATE, 2008 WL 5412205 (December 24, 2008): DISCOVERY/ DUE PROCESS/ SUFFICIENCY OF THE EVIDENCE

D allegedly raped his daughter repeatedly over a period of four years. D was scheduled for trial on December 12, 2007 after it had twice been continued by the court. The day before this final date, D was informed that V just turned over a journal to the State. D requested a continuance but the court only gave him one day to review the journal. After reviewing the journal, D moved to suppress but he did not renew his request for a continuance. The suppression motion was denied and D was later convicted of rape and related offenses.

Because it was not clear to the Court what decision D was appealing, suppression or continuance, it affirmed the convictions as to either ground. D argued the admission of the journal deprived him of the ability to prepare an effective defense and that there was insufficient evidence to convict D. But, the Court found that D's claims of alleged prejudice from the late disclosure of the journal were conclusory and unsupported by the record. While D may have benefited from more time to review the journal, the admission of the journal was not an abuse of discretion and the denial of D's continuance request was not plain error.

The Court also upheld the trial court's conclusion that there was sufficient evidence in the record to support D's convictions. V's corroborated testimony was sufficient.